90-1524

Supreme Court, U.S.
FILED
MAR 12 1991
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE

UNITED STATES

No.

October Term 1990

ALLEN H. SMITH,
Petitioner

VS.

MARY JANE SMITH,
Respondent

PETITION FOR A WRIT OF CERTIORATI

TO THE SUPREME COURT OF PENNSYLVANIA

MIDDLE DISTRICT

Leo E. Gribbin,Esq.
Co-Counsel
138 E. Market St.
York,Pa. 17401
(717) 854-9506

Allen H. Smith,Esq.
47 N. Duke St.
York,Pa. 17401
(717) 854-6609
Counsel of Record
for Petitioner

QUESTION PRESENTED

May a court bar a litigant in a civil proceeding from presenting "evidence -- his own testimony and that of witnesses -- as punishment for asserting the privilege against self-incrimination?

TABLE OF CONTENTS pg

QUESTION PRESENTED----------i

TABLE OF AUTHORITIES----------ii-iii

PETITION----------1

OPINIONS BELOW----------2

JURISDICTION----------2-3

STATUTES INVOLVED----------3

STATEMENT OF THE CASE----------4-8

REASONS FOR GRANTING THE WRIT

The lower court has decided an important question of federal law in an unprecedented manner----------9-10

The matter should be settled by this Court----------11-14

CONCLUSION----------15

APPENDIX TABLE OF CONTENTS--------A-i

APPENDIX----------A-1-21

TABLE OF AUTHORITIES

Cases pg

Baxter v. Palmigiano, 425 U.S. 308, 96 S.Ct. 1551, 47 L.Ed2d 810 (1976)---------- 10,11 14

Cohen v. Beneficial Ind. Loan Corp., 337 U.S. 541, 93 L.Ed 1528 (1948)---------- 3

Gardner v. Broderick, 392 U.S. 273, 88 S.Ct. 1913, 20 L.Ed2d 1082 (1968)---------- 13

Garrity v. New Jersey, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed2d 562 (1967)---------- 13

Kramer v. Levitt, 79 Md.App. 575, 556 A.2d 760 (1989)---------- 9,12

Lefkowitz v. Cunningham, 431 U.S. 801, 97 S.Ct. 2132, 53 L.Ed2d 1 (1977)---------- 14

Cases pg

Lefkowitz v. Turley, 414 U.S. 70, 94 S.Ct. 316, 38 L.Ed2d 274 (1973)----------14

Lyons v. Johnson, 415 F.2d 540 (9th Cir. 1969)----------9

Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L.Ed2d 653 (1964)----------13

Spevack v. Klein, 385 U.S. 511, 87 S.Ct. 616, 17 L.Ed2d 562 (1967)----------13

Uniformed Sanitation Men Ass'n Inc, v. Commissioner of Sanitation, 392 U.S. 280, 88 S.Ct. 1917, 20 L.Ed2d 1089 (1968)----------14

Statutes

28 U.S.C. 1254(1)----------3

OTHER

U.S. Const., Amendment 5----------A-21

U.S. Const., Amendment 14----------A-21

IN THE SUPREME COURT OF THE UNITED STATES

Term, 1990

ALLEN H. SMITH,

Petitioner

v.

MARY JANE SMITH,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, Allen H. Smith, respectfully prays that a writ of certiorari issue to review the Per Curiam Order of the Supreme Court of Pennsylvania entered in the above-captioned

proceeding on December 13, 1990, and in the al ternative to summarily reverse under Rule 23.1 the said judgment at 159 M.D. Allocatur DKT. 1990.

OPINIONS AND ORDERS BELOW

Reported: None.

Unreported

- Order of Supreme Court of Pa.----A 1-2
- Order of Superior Court of Pa.---A-3
-Opinion of Court of Common Pleas of York County, Pa.----------A-4-5
- Order of the Court of Common Pleas of York County, Pa.----A-6-11

JURISDICTION

The initial order in the Court of Common Pleas was entered March 1, 1990. (A5-8). Notice of Appeal was filed within thirty days on March 29, 1990.

The Superior Court of Pennsylvania entered judgment June 7, 1990 (A-3). Husband petitioned for Allowance of Appeal to the Supreme Court of Pennsylvania within thirty days on July 5, 1990. The Supreme Court of Pennsylvania entered judgment December 13, 1990 (A-1).

Statute relied upon for jurisdiction: 28 USC 1254(1).

Also: Cohen v. Beneficial Ind. Loan Corp., 337 U.S. 541 (1948)(separable, collateral order; important; right irreparably lost if not reviewed).

CONSTITUTIONAL PROVISIONS AND STATUTES

5th Amendment, U.S. Const. - A-21

14th Amendment, U.S. Const.- A-21

STATEMENT OF THE CASE

Parties are before the court for equitable distribution. Plaintiff-wife seeks information about husband's affairs for a period under investigation by the Internal Revenue Service. Husband has raised the Fifth Amendment privilege against self-incrimination in response to some of her questions. Wife has sought sanctions barring husband from offering any evidence in opposition to her claims. After a colloquy (A-12) with parties and counsel, the Court of original jurisdiction entered an order stating:

> If the husband has prevented the wife from ascertaining facts or exploring facts by use of the fifth amendment, husband must suffer civil consequences. He will not be

> permitted, for example to bar the wife from discovering relevant information about real estate and then offer evidence at the Master's hearing that the real estate ventures were unprofitable... The Master is informed that total witness or evidence preclusion is a drastic sanction to be invoked only if it clearly appears to be warranted... To repeat, if wife has been prejudiced by the Defendant's refusal to provide information, evidence offered by him may not be considered.

(A6-11) (Petitioner's emphasis).

In a colloquy immediately following this order, the Judge was asked to amplify the previous point:

MR. GRIBBIN: Your Honor, if I understand your order correctly it would only pertain to the defendant not to the presentation of evidence on behalf of the defendant by parties other than himself.

THE COURT: No, that's not correct. That's the problem I didn't really want to get into because prejudice would have to be determined really at the time of the offer. But I should say this in the order. When the court has said that the Defendant may be precluded from offering testimony, it did not mean to limit evidence to testimony. If wife has been prejudiced by the defendant's refusal to provide in-

formation, he may be precluded from offering evidence.

MR. GRIBBIN: Your Honor, if I may take an exception to that.
THE COURT: You will have an exception to this.
MR. GRIBBIN: That effectively puts him out of Court, and I think that's Constitutionally impermissible.
THE COURT: It may be but that's the ruling.

The Court reiterated this in its opinion pursuant to Pennsylvania Rule of Appellate Procedure 1925(a)(A-4-5).

To this March 1, 1990 ruling, Husband filed a Notice of Appeal to

the Superior Court of Pennsylvania March 29, 1990. Wife moved to quash. The Superior Court quashed June 7, 1990 (A-3). Husband within thirty days petitioned the Supreme Court of Pennsylvania for Allowance of Appeal July 5, 1990. The Supreme Court of Pennsylvania denied the Petition December 13, 1990 (A-1), in which Husband had argued the appealability and constitutionality the lower court's ruling, as he had done in the Superior Court.

REASONS FOR GRANTING WRIT

I. A court of common pleas has decided that a defendant pleading the privilege against self-incrimination in civil discovery proceedings may be barred not only from testifying but also from producing evidence.

This is unprecedented.

Courts have dismissed complaints when plaintiffs pleaded the fifth amendment in response to discovery requests. Lyons v. Johnson, 415 F.2d 540 (9th Cir. 1969). But your Petitioner is in court involuntarily and not raising claims. The Court has deprived him of the right to defend, the right to call witnesses, the right to produce evidence in rebuttal. The only court which has considered this question has decided it the opposite way: Please see Kramer v. Levitt, 79 Md. App. 575, 557 A.2d 760 (1989).

Of course there are civil consequences to be paid for pleading the fifth amendment. Your Petitioner understands that he may not use the Fifth Amendment as a shield and then as a sword by blocking discovery and then introducing surprise evidence at trial. He understands he may be barred from testifying. He understands adverse inferences may be drawn from his silence. Baxter v. Palmigiano, 425 U.S. 309, 319, 96 S.Ct. 1551, 47 L.Ed2d 810, 821 (1976). His point is that the Court went well beyond these usual and customary sanctions. It tied his hands as well as his tongue, where his wife has been prejudiced. Your Honorable Court is asked to decide whether one may be rendered totally defenseless in order to secure one's Fifth Amendment privilege against self-incrimination.

II. This question is not squarely addressed by any decision of this Court, all prior decisions having to do with the Fifth Amendment in cases between individuals and states.[1]

This Court has never looked at the Fifth Amendment in a case between individuals. Justice Brennan in his separate opinion in Baxter v. Palmigiano, 425 U.S. 308, 96 S.Ct. 1551, 47 L.Ed2d 810 (1976) has said:

> In a civil suit involving only private parties, no party brings to the battle the awesome powers of the government, and therefore, to permit an adverse inference to be drawn from exercise of the privilege does not implicate the policy considerations underlying

the privilege.

Id. at 425 U.S. 335, 47 L.Ed2d 831.

Your Petitioner's concern is whether witness preclusion does implicate the policy considerations underlying the privilege. Such draconian sanctions authorize a taking without due process of law, in violations of the Fifth and Fourteenth Amendments, in that due process means the right to defend. The lower court made due process of law the price to be paid for securing the privilege against self-incrimination. Your Petitioner asks this Court to hold as the Special Appeals Court of Maryland has held in Kramer v. Levitt, 79 Md. App. 575, 556 A.2d 760 (1989): that a defendant in a civil action who pleads the Fifth Amendment in response to discovery requests may not testify at trial

on matters pertaining to such requests, but may produce independent witnesses to prove any defenses raised if appropriate discovery rules are complied with.

1

The Fifth Amendment privilege against self-incrimination was applied to the states in Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed2d 653 (1964). Since then, this Court looked at it in seven civil cases, all involving an individual and a state seeking to impose a penalty: Spevack v. Klein, 385 U.S. 511, 87 S.Ct. 625, 17 L.Ed2d 574 (1967)(disbarment); Garrity v. New Jersey, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed2d 562 (1967)(removal from office); Gardner v. Broderick, 392 U.S. 273, 88 S.Ct. 1913, 20 L.Ed2d 1082 (1968)(removal

from office); Uniformed Sanitation Men Ass'n Inc. v. Commissioner of Sanitation, 392 U.S. 280, 88 S.Ct. 1917, 20 L.Ed2d 1082 (1968)(loss of employment); Lefkowitz v. Turley, 414 U.S. 70, 94 S.Ct. 316, 38 L.Ed2d 274 (1973) (cancellation of state contracts); Baxter v. Palmigiano, 425 U.S. 308, 96 S.Ct. 1551, 47 L.Ed2d 810 (1976) (adverse inference in a disciplinary proceeding); Lefkowitz v. Cunningham, 431 U.S. 801, 97 S.Ct. 2132, 53 L.Ed2d 1 (1977)(removal from office).

CONCLUSION

The trial court effectively put the Petitioner out of court on matters in which he has raised the Fifth Amendment privilege. Witness preclusion and evidence preclusion have never been considered by this court as penalties for exercising the Fifth Amendment privilege. This Court is asked to hear the case to prevent what would amount to a taking without due process of law and an abridgement by the state of the privilege against self-incrimination, in violation of the Fourteenth Amendment. (A-21).

Respectfully submitted,

Allen H. Smith, Esq.
Counsel of Record for
Petitioner
47 N. Duke St.
York, PA 17401
717-854-6609

Leo E. Gribbin, Esq.

Co-Counsel for Petitioner

138 E. Market St.

York, PA 17401

717-854-9506

APPENDIX TABLE OF CONTENTS

Supreme Court of Pa. Order of
Dec. 13, 1990---------- A-1-2

Superior Court of Pa. Order of
June 7, 1990---------- A-3

Court of Common Pleas of York
County, Pa. Opinion Pur-
suant to Pa.RAP 1925(a)---- A-4-5

Court of Common Pleas of York
County, Pa., Order of
March 1, 1990---------- A-6-11

Redacted transcript of Mar.
1, 1990 proceedings-------- A-12-20

Fifth Amendment, U.S. Const.----- A-21

Fourteenth Amendment, U.S. Const. A-21

SUPREME COURT OF PENNSYLVANIA - MIDDLE DISTRICT

MILDRED E. WILLIAMSON
DEPUTY PROTHONOTARY

434 Main Capitol
PO Bx 624
Harrisburg, PA
(717)787-6181

Leo E. Gribbin, Esq.
138 E. Market St.
P.O. Box 2588
York, PA 17405-2588

RE: MARY JANE SMITH V. ALLEN H. SMITH, Pet., No. 159 M.D. Allocatur Dkt. 1990

Dear Counsel:

This is to advise that the following Order has been entered for the Petition for Allowance of Appeal filed for the above-captioned matter:

"December 13, 1990, - Petition Denied Per Curiam."

Very truly yours,
Shirley Bailey

Chief Clerk

SPB/pam

XC: Hon. Oscar F. Spicer, Spec. Presiding

Rees Griffiths, Esq.

Prothy - York County

(No. 80 S 4440)

MARY JANE SMITH IN THE SUPERIOR COURT

V. OF PENNSYLVANIA

ALLEN H. SMITH NO. 205 HBG 1990

ORDER

The Court hereby grants the Motion to quash the above-captioned appeal. Appellee's request for counsel fees is granted and the case is remanded to the trial court to determine the amount of damages authorized by Pa.RAP 2744.

PER CURIAM

Date: June 7, 1990

A TRUE AND CORRECT COPY:

ATTEST: June 7, 1990

Mildred E. Williamson

Deputy Prothonotary

IN THE COURT OF COMMON PLEAS OF YORK

COUNTY PENNSYLVANIA

CIVIL

MARY JANE SMITH, No. 80 S 4440

v.

ALLEN H. SMITH

OPINION PURSUANT TO PARAP 1925

The undersigned was appointed to specially preside over this case on October 28, 1987. The Court conducted a conference with counsel in an attempt to move the case along.

Thereafter, litigation went into hibernation as the parties worked toward settlement. During a telephone conference March 22, 1988, for example, the Court was told that an agreement in principle covering most issues had been reached and the Court was requested to hold in abeyance all proceedings.

Negotiations apparently failed and the undersigned has again become involved

in expediting final resolutions. On March 1, 1990, an order was entered in the presence of counsel and the parties. A copy is attached. The undersigned believes that it requires no comment and is clearly interlocutory.

What rulings may be entered after a Master's hearing is, at this point in time, purely conjectural. The order clearly advised "that total witness or evidence preclusion" (page 2, line 10-11) was a drastic sanction to be imposed only if clearly warranted.

The undersigned is concerned about the further delay this appeal is causing.

Dated: April 4, 1990

BY THE COURT:

OSCAR F. SPICER

President Judge

Specially Presiding

51 st Judicial District

IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA

MARY JANE SMITH No. 80 S 4440

v.

ALLEN H. SMITH

ORDER OF COURT

AND NOW, March 1, 1990, the parties appeared with counsel. The matter comes before the Court on Plaintiff's request for relief. Plaintiff has contended that husband has consistently refused to cooperate in ascertaining the extent of marital property and has exercised his rights under the United States Constitution fifth amendment in refusing to answer interrogatories.

During the course of a conference, the Court has considered Exhibits N,O, P, and Q presented by the attorney for the wife. The Court has also cursorily reviewed a 1982 support proceeding before Judge Buckingham. It would appear that

at least unitl 1982 the husband was answering questions and subjecting himself to cross-examination. The Court is of the opinion that most of the relief requested by wife should be determined by the Master in light of all of the circumstances and testimony at the Master's hearing. However, for purposes of guidance, the following principles are established:

If the husband has prevented the wife from ascertaining facts of exploring facts by use of the fifth amendment, husband must suffer civil consequences. He will not be permitted, for example, to bar the wife from discovering relevant information about real estate and then offer evidence at the Master's hearing that the real estate ventures were unprofitable. To the extent, however, that wife has obtained information about

the operations and profitability of the real estate ventures, husband should not be precluded from testifying totally. The Master is informed that total witness or evidence preclusion is a drastic sanction to be invoked only if it clearly appears to be warranted. A preferable method would be to receive evidence subject to a motion to strike so that prejudice can be determined from the entire record.

The relief requested by wife referring to Wasp, Inc., is probably premature. The Court on February 20, 1990 directed that depositions of the appropriate officials in that corporation should proceed.

The subject of the husband's law practice has been discussed. Whether or not the law practice is subject to equitable distribution, it is still a

relevant factor concerning both alimony and equitable distribution. To the extent that the husband has prevented the wife from obtaining information about the law practice either through refusal to answer interrogatories or otherwise, the Master is certainly entitled to draw an inference that information if provided would be adverse to the husband's interests.

The wife has stated that she has not received a tax return from husband since 1981. The Court rules that the husband can have no fifth amendment rights to refuse to provide these. The Defendant is directed to provide copies of his Federal Income Tax returns for the years 1977, 1978, and 1982 until the present to wife's counsel within thirty days of today's date. If husband is unable to comply with this, he must request

an extension with specific reasons. Otherwise, he will be held in contempt of Court.

The next issue that has been discussed has been jewelry. There is a hot dispute about whether this is marital property. The particular subject before the Court is the husband's refusal to divulge information concerning safe deposit boxes that were opened and maintained by him after the disappearance of the jewelry. The Master would be permitted to draw an inference that the existence, location and other data about those boxes would lead to information adverse to husband's interests.

The last issue has been assessment of costs. The Court feels that that particular subject should be addressed in terms of the overall situation be-

tween the parties. It is therefore left to the Master for evaluation and recommendation.

To protect husband's fifth amendment rights, his providing of tax returns shall not be construed as an admission by him that he personally filed them.

To repeat, if wife has been prejudiced by the Defendant's refusal to provide information, evidence offered by him may not be considered.

BY THE COURT:

Oscar F. Spicer

Specially Presiding

Rees Griffiths, Esq.

Joann Kehr, Esq.

Leo Gribbin, Esq.

akw

REDACTED TRANSCRIPT OF PROCEEDINGS

Thursday, Mar. 1, 1990

Gettysburg, PA

Transcript of proceedings held in the case of Mary Jane Smith vs. Allen H. Smith, 80 S 4440, a York County case, held before the Honorable Oscar F. Spicer, Specially Presiding, the following proceedings were held:

(Beginning at or about 1:10pm)

THE COURT: All right, are we ready to go?

MR. GRIFFITHS: Yes we are, Your Honor. May it please the Court I am Rees Griffiths and I am one of the lawyers for Mrs. Mary Jane Smith, Petitioner in the matter before you which is a motion for sanctions against her former husband, Allen H. Smith for pleading the privilege against self-incrimination in response to asset

disclosure interrogatories propounded in a divorce litigation.

MR. GRIFFITHS: We have also asked, Your Honor, that Mr. Smith be. and this is a critical part of what I am going to present today, that Mr. Smith be barred from introducing evidence at the equitable distribution hearing. We don't think it's appropriate for him to pick and choose. That is to keep large amounts of relevant information from us regarding the marital assets which we have no other source to obtain other than him and them to come in an testify with respect to the very same assets which he hasn't disclosed to us. If it's difficult of impossible or exposes him to jeopardy to provide us in advance of hearing with relevant material regarding the parties marital assets, then he certainly cannot appear

at the hearing and make what we would view as self-serving statements on the same issues that with respect to which he's deprived us of pre-trial discovery and we think even if the court honors his fifth amendment plea and finds it to be proffered in good faith that the court nevertheless is obliged under the cases cited in our brief to require that a bar be imposed against the offering of evidence by the Defendant in the equitable distribution proceeding.

THE COURT: If I can interrupt for just a minute. Perhaps we ought to treat this as a conference to start with and then perhaps go into a hearing if need be. I would feel more comfortable if we would do this in Room 411, our conference room. So may

we do that?

MR. GRIFFITHS: Whatever the court's pleasure is, Your Honor.

MR. GRIBBIN: Fine, Your Honor.

THE COURT: Let's just go into the jury room. (Whereupon counsel and the Court retire to Jury Room #1 and after a discussion off the record, the following occurred at or about 1:55pm).

THE COURT: Let the record show we are in the jury room. And the parties and their lawyers are here along with Mr. Madden from Philadelphia who is special counsel for the Defendant.

With that little background we'll go to my understanding of witness preclusion. Witness preclusion is a remedy that is ordered only in the most extreme circumstances, but any time that a person has refused to give information either through disclosure or through mechanical

means such as inventory and appraisement and so forth to the prejudice of the other party, that party may be prevented from testifying and I gave the opinion that if Mr. Smith had not been candid, not given a full disclosure of his equitable assets and then came to the Master's hearing, for example, and tried to testify, that the testimony would be subject to a motion to strike and that the wife's testimony would be then considered as unopposed and uncontradicted....

THE COURT: If you don't disclose business arrangements and so forth, you cannot make a statement that they lose money. That's what we're talking about when we're talking about prejudice.

When you make your testimony unavailable or the information unavailable, then you're stuck with the consequences.

MR. GRIBBIN: Before the Court enters any order I would respectfully request that the Court read my brief on that point. Basically, Your Honor, his fifth amendment right is a privilege. It's a privilege not only under the federal and the state law constitution but also under our rules of civil procedure. He just does not have to give that. If it would tend to incriminate him or offer or be a link in the chain of anything that could incriminate (sic) him. The inference and I'd like you particularly to look at this area of the law, Your Honor, the inference that can be drawn is a very narrow inference. It pertains only in the cases cited. In the Decatur case and in the Kenny case only to a narrow admission from the pleadings. I found no law. Perhaps I am wrong on this. Maybe you

could point it out to me if I am, but I have found no law which permits the Court to draw the broad sanctions that Plaintiff is seeking and particularly as to putting him out of Court and not permitting him to present evidence or to testify.

THE COURT: I had some time to think about this after a case and I didn't do any extensive research on it but one of your ex-associates from York County in a case here, Dick Noll, do you remember Dick Noll? In a civil case he advised his client to refuse to answer questions and at that point I determined that what he had done was to make the person subject to insulate him from cross-examination and rule is fairly clear if you can't cross-examine somebody, the testimony of that witness is subject to being stricken. And that's where we are really. If you just take

a look at that basic rule, then I think sanctions sort of flow automatically.

THE COURT:. . . My only regard is how has his wife been hampered by husband's refusal to divulge information. To the extent she's been hampered he should be punished whatever the reason. If he has claimed the fifth that's a right that we have. I tell the jury that several times a month. He has the right to do it but he does not have the right to pretend like it didn't happen in this type of an action. The consequences civilly are inescapable and the consequences are if he deprived her of information or the right to get information, then he must suffer a penalty for it.

I guess perhaps my big problem in this particular case is that most of what we are talking about is

something that a Master should determine on the basis of a hearing. Probably everything should come in that should come in liberally and there should be a motion to strike so that we could review the request for sanctions in light of what happened in the proceeding.

FIFTH AMENDMENT, U.S. CONST.

...nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law...

FOURTEENTH AMENDMENT, U.S. CONST., Sec. 1

...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law...